Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 85-678

In The
Supreme Court of the United States
October Term, 1985

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UNITED PACIFIC INSURANCE CO.
and ORLANDO-ANASTASI JOINT VENTURE,
Petitioners,

v.

ANIERO CONCRETE CO., INC.,
Respondent.

—o—

RESPONSE IN OPPOSITION TO PETITION OF UNITED PACIFIC INSURANCE CO. AND ORLANDO-ANASTASI JOINT VENTURE FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

—o—

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COUNTERSTATEMENT OF THE CASE

This case involves a suit by plaintiff-respondent, Aniero Concrete Co., Inc. ("Aniero"), a concrete subcontractor, against defendant-petitioner, Orlando-Anastasi Joint Venture ("Orlando-Anastasi"), a general contractor, and its bonding company, defendant-petitioner, United Pacific Insurance Co. ("United Pacific"), for monies due Aniero for work performed under a Subcontract with Orlando-

Anastasi and for extra work performed by Aniero for the general contractor. On March 9, 1984, during the presentation of petitioners' case, the petitioners sought to present Ms. Susan Carrochi ("Carrochi"), the legal assistant of defendant's trial counsel, Edward M. Dunham, Jr., Esq., as a witness. Carrochi's testimony was to be a recital of statements which she allegedly heard Rudolph Orlandini[1] make in two (2) trial-preparation interviews conducted by Edward M. Dunham, Jr., Esq., as trial attorney for petitioners. The Trial Court ruled that the testimony of Carrochi was admissible under New Jersey Evidence Rules 63(7) (R1a)[2] and 63(10) (59a)[3].

Immediately following the Trial Court's ruling on the admissibility of the Carrochi testimony, respondent sought leave to file an interlocutory appeal with the New Jersey Superior Court, Appellate Division. The Appellate Division granted respondent's application for leave to file an interlocutory appeal, and reversed the Trial Court's ruling admitting the testimony of Carrochi. The Appellate Division's ruling is contained in an Order (7a-8a) entered on March 9, 1984. In reversing the Trial Court's ruling, cer-

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[1]Rudolph Orlandini was a named defendant, along with the petitioners. In addition, Rudolph Orlandini was a principal of Orlando Construction Co., Inc., another named defendant, and one of the two corporations forming the Orlando-Anastasi Joint Venture. The other half of the joint venture was Anastasi Brothers Corporation, which was also named defendant. The principal of Anastasi Brothers Corporation is Joseph S. Anastasi, who was likewise named a defendant in this matter.

[2]R1a indicates reference to respondent's Appendix Page 1a.

[3]59a refers to petitioner's Appendix Page 59a. Further references to petitioner's Appendix and respondent's Appendix will be distinguished by the use of "R" in front of the page number when referring to respondent's Appendix.

tain factual information was presented to the Appellate Division and was considered by it in connection with its analysis of the issues. This factual information was admitted by the petitioners and is summarized as follows:

1. That on June 26 and November 5, 1983, petitioners' counsel, Edward W. Dunham, Jr., conducted trial preparation interviews of Orlandini, an individual enrolled in the Federal Witness Protection Program.

2. That the first interview of Orlandini was attended by Mr. Dunham, Ms. Carrochi, a legal assistant employed by Mr. Dunham, and by Joseph Anastasi, Mr. Dunham's client, one of the named defendants in this action.

3. That Joseph Anastasi was a principal of Anastasi Brothers Corporation, one of the two corporations forming the joint venture, Orlando-Anastasi.

4. That the out-of-Court declarant, Orlandini, was a principal of Orlando Construction Company, the other corporation forming the joint venture, Orlando-Anastasi.

5. That the second interview of Orlandini was attended by Mr. Dunham, Ms. Crarochi and David G. White, Esq., New Jersey counsel for petitioners.

6. That petitioners sought to have Carrochi testify at the trial concerning statements heard by her during the course of the two (2) trial preparation interviews conducted by Mr. Dunham.

7. That there were no stenographic, sound or video recordings made of the interviews with Orlandini.

8. That Orlandini was not placed under oath during either of the interviews.

9. That the interviews of Orlandini were conducted by Mr. Dunham, petitioners' trial counsel, and that respondent's counsel were not present at either of these interviews.

10. That the out-of-court declarant, Orlandini, is a party defendant in this action.

11. That at the time that Orlandini was interviewed, there was no crossclaim filed against Orlandini by any of the other defendants.

12. That Orlandini's deposition was taken in connection with this matter and would be read to the jury as part of petitioners' case.

13. That Carrochi had no personal knowledge of any of the facts relating to the matters at issue in the litigation.

The Order entered by the Appellate Division provided petitioners with an opportunity to move before the Supreme Court of New Jersey in an attempt to have the Appellate Division's interlocutory ruling overturned. Defendants took advantage of this proviso in the Order and on March 12, 1984, submitted a Motion for Leave to Appeal to the New Jersey Supreme Court. Petitioners' Motion for Leave to Appeal was presented to the entire New Jersey Supreme Court on March 13, 1984. On that date, the New Jersey Supreme Court denied petitioners' Motion for Leave to Appeal. An Order embodying the New Jersey Supreme Court's ruling was entered on March 13, 1984 (R2a).

On March 15, 1984, the jury returned a unanimous verdict in favor of respondent and against petitioners awarding respondent its entire claim.

Following the entry of judgment, respondent appealed from the Trial Court's ruling on the question of prejudgment interest. Petitioners cross appealed. On May 6, 1985, the Appellate Division delivered its written decision (1a) wherein, *inter alia*, it affirmed its interlocutory ruling that the statements of Orlandini to be recited by Carrochi were not admissible under New Jersey Evidence Rule 63(10).

United Pacific and Orlando Anastasi filed a Petition for Certification with the New Jersey Supreme Court on June 28, 1985. By Order dated July 23, 1985 (6a), petitioners' Petition for Certification was denied.

ARGUMENT

A.

THE QUESTION PRESENTED BY PETITIONERS WAS NOT RAISED IN OR DECIDED BY THE APPELLATE DIVISION AND THEREFORE THE APPELLATE DIVISION'S DECISION SHOULD NOT BE REVIEWED BY THIS COURT.

The question presented to this Court for review was never presented to the Appellate Division. The entire argument advanced by petitioners before the Appellate Division is contained in Point III, Subpoint B of the Brief filed upon behalf of petitioners in the Appellate Division proceedings (R3a-R7a).

In their Appellate Division Brief, petitioners made the following argument:

> As set forth above, when this Court reversed the decision of the Trial Court, it apparently relied on its perception of the scope of immunity, if any, from civil and criminal prosecution granted Orlandini in the Witness Protection Program. This perception could only have been based on what the Court thought it knew about the program. It most certainly was not based on the record as there was no evidence whatsoever before the Trial Court as to the terms and conditions of Orlandini's agreement with the government. (R5a).

The petitioners then went on to argue:

> Inasmuch as it was Aniero that sought the *in limine* ruling from the Trial Court as to the admissibility of Carrochi's testimony, it was Aniero's burden to show that *Evid. R.* 63(10) exception to the hearsay rule did not apply. Aniero failed to produce any such evidence. (R5a).

Thus, it is clear that the only argument raised before the Appellate Division by the petitioners was that it was Aniero's burden to introduce evidence with respect to the scope of immunity provided by the Witness Protection Program. This argument obviously did not impress or persuade the Appellate Division. This argument is not the argument advanced in the Petition.

It is well settled that "it is essential to the jurisdiction of this Court in reviewing a State Court decision that the record affirmatively show not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." *Lynch v. State of New York,* 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934). Here, petitioners did not present to the Appellate Division the Federal question through which they now seek to invoke the jurisdiction of this Court. Furthermore, the Federal question allegedly presented in the Petition was not necessary to the Appellate Division's determination of the cause nor was it decided by the Appellate Division.

In rendering its May 6, 1985 decision, the Appellate Division based its ruling that New Jersey Evidence Rule 63(10) was unavailable to petitioners as a means of pre-

senting hearsay testimony to the jury, on the logical and reasonable grounds that Orlandini's statements "do not qualify as declarations against interest because they were made when Orlandini knew that *as a practical matter* he would be free of any adverse consequences from his words because of his entry into the government's witness-protection program. *R.* 63(10)." (Emphasis added) (4a). The Appellate Division's ruling merely stated that in the unique circumstances of this case, the hearsay statements of Orlandini were not admissible as an exception to the hearsay Rule under New Jersey Evidence Rule 63(10).

Thus, it is clear that the question presented for review, *i.e.*

> Does an individual's entry into the Federal Witness Protection Program *ipso facto* relieve that individual of his liability to penal sanctions and his liability for pecuniary judgments;

was not presented to the Appellate Division, nor was it considered or decided by that Court, and for that reason the Appellate Division's decision should not be reviewed by this Court.

B.

THE APPELLATE DIVISION DECISION INTERPRETING A STATE EVIDENCE RULE SHOULD NOT BE REVIEWED BY THIS COURT.

Petitioners' claim that the Appellate Division improperly excluded the hearsay statements of Orlandini from the jury. In rendering its decision, the Appellate Division interpreted New Jersey Evidence Rule 63(10). That Rule, along with a host of other Evidence Rules, was adopted in 1967 pursuant to an act of the New Jersey

Legislature. The history of the adoption of the New Jersey Rules of Evidence is set out succinctly in the Preliminary Comments to the Rules, prepared by the Honorable Vincent P. Biunno, U.S.D.J. (See R8a-R9a).

In *Greenough v. Tax Assessor of the City of Newport,* 331 U.S. 486, 91 L.Ed. 1621, 67 S.Ct. 1400 (1947) *reh. den.,* 332 U.S. 783, 92 L.Ed. 367, 68 S.Ct. 28 (1947), this Court had occasion to comment upon the ability of State Courts to interpret their own State's enactments. In *Greenough,* Justice Reid stated:

> State Courts construe their statutes according to their understanding of State policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their State law. It is only in circumstances where their judgments collide with rights secured by the Federal Constitution that we have power to protect or enforce the federal rights. 331 U.S. at 497.

In the matter now before this Court, the Appellate Division of the Superior Court of the State of New Jersey has interpreted a New Jersey Evidence Rule, which pursuant to legislative mandate, was adopted through a process in which all three branches of New Jersey's Government participate. Clearly, the Appellate Division's decision interpreting a New Jersey Evidence Rule has not collided with petitioners' federal rights and therefore, that decision should not be reviewed by this Court.

C.

THE PETITIONERS HAVE NOT DEMONSTRATED THAT THERE IS ANY SPECIAL OR IMPORTANT REASON WHICH WOULD WARRANT THIS COURT EXERCISING ITS DISCRETION TO GRANT A PETITION FOR A WRIT OF CERTIORARI.

The decision of the Appellate Division interpreting New Jersey Evidence Rule 63(10) is neither novel nor unusual. It is the type of decision which is made regularly by State appellate tribunals. Notwithstanding the patently routine nature of the Appellate Division's ruling, and its clear limit to the facts of this case, petitioners have sought to transform the Appellate Division decision into one which "threatens the Witness Protection Program" (P23).[4]

Clearly, not even th most strained reading of the Appellate Division decision of May 6, 1985 would support an argument that it stands for the proposition that an individual's entry into the Federal Witness Protection Program *ipso facto* relieves that individual of his liability to penal sanctions and his liability for pecuniary judgments. No such statement is contained in the Appellate Division's decision nor can such a statement be reasonably inferred therefrom. The Appellate Division merely excluded evidence, which petitioners' admitted was hearsay, because in its opinion the unique circumstances of the individual who made those statements did not warrant the application of the declaration against interest exception [Rule 63(10)] to New Jersey's hearsay rule.

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[4]P23 refers to Petition for Writ of Certiorari, page 23.

The position advanced in the Petition that "the decision of the Appellate Division threatens the Witness Protection Program" (P23) is a patently specious one. Nowhere in the Petition have petitioners advanced any valid argument that there exists some special or important reason warranting this Court's exercise of its discretionary review power. Having failed to articulate such reasons, their Petition for a Writ of Certiorari should be denied by this Court.

—o—

CONCLUSION

Petitioner has failed to demonstrate in its petition that the issue presented to this Court for review was presented to the Appellate Division for its consideration, and has likewise failed to demonstrate that the Appellate Division's interpretation of a New Jersey Evidence Rule is subject to this Court's review or that the decision is so novel and so important that it should be accepted by this Court for review. Therefore, respondent, Aniero Concrete Co., Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Dated: November 19, 1985

APPENDIX

NEW JERSEY EVIDENCE RULE 63(7). ADMISSIONS BY PARTIES.

A statement made by a person who is a party to an action is admissible against him in that action. Admissibility of statements by defendants in criminal actions is subject to Rule 8(3).

SUPREME COURT OF NEW JERSEY
C-1036 SEPTEMBER TERM 1984
24,111

ANIERO CONCRETE CO, INC.,

Plaintiff-Respondent,

vs.

ORLANDO-ANASTASI JOINT VENTURE, et al,

Defendants-Petitioners.

ON PETITION FOR CERTIFICATION

(Filed July 24, 1985)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4094-83T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 23rd day of July, 1985.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

POINT III

BECAUSE THIS COURT'S REVERSAL OF THE TRIAL COURT'S RULING ON AN EVIDENTIARY QUESTION CONSTITUTED PREJUDICIAL ERROR, THIS COURT SHOULD REVERSE OR, IN THE ALTERNATIVE, REMAND FOR A NEW TRIAL.

A. *The Court Erred In Granting Aniero's Motion For Leave To Appeal The Evidentiary Ruling Of The Trial Court.*

One of the most firmly established of all jurisprudential propositions is that found in *Purdy v. Nationwide Mutual Ins. Co.*, 184 N.J. Super 123, 130 (App. Div. 1982):

> [T]he admission or exclusion of proffered evidence is a matter which resides within the sound exercise of discretion by the trial judge, *Dolan v. Newark Iron & Metal Co.*, 18 N.J. Super. 450, 455 (App. Div. 1952), and the exercise of that discretion will not ordinarily be disturbed unless there is a marked abuse of discretion. *State v. Wise*, 19 N.J. 59, 98 (1955). Reversal will follow only in cases of a clear abuse. *Schweizer v. MacPhee*, 130 N.J. Super. 123, 127 (App. Div. 1974).

Only after the Trial Court had heard extensive argument and considered briefs submitted by both parties did it rule on the admissibility of the proffered testimony of Carrochi. With all due respect to this Court, it is almost inconceivable that it could have found a "marked abuse of discretion" by the Trial Court in the limited argument presented to it by the parties and in the absence of even a cursory examination of the record.

Allowance of piecemeal appeals of evidentiary rulings in the midst of trial are extraordinarily disrupting to the "just determination, simplicity in procedure, fairness in administration and elimination of unjustfiable expense and

delay'' mandated by R.1:1-2 and should be looked upon with considerable disfavor.

This Court should reconsider and reverse its decision overruling the evidentiary ruling of the Trial Court in the absence of any hint of an abuse of discretion by the Trial Court and, in so doing, reverse or, in the alternative, remand for a new trial.

B. *The Court Erred In Reversing The Order Of The Trial Court Admitting The Proffered Testimony Under Evid. R. 63(10) and 63(7).*

Defendants sought to call Carrochi to testify concerning certain information she and Dunham learned from Orlandini during the course of two lengthy interviews with Orlandini. During these conversations, Orlandini related acts and conversations between Orlandini, Crevani and others. To the extent that these activities constituted verbal acts (such as Crevani's agreement to the scheme), there is no hearsay problem at all. Orlandini may properly describe such acts. *See, Ringwood Assoc. Ltd. v. Jack's of Rt. 23,* 166 N.J. Super. 36 (App. Div. 1979). To the extent that Orlandini related acts and conversations to Carrochi subject to the general hearsay rule, exceptions to the rule apply so as to eliminate any hearsay problem.

(1) *Crevani's statements.*

Orlandini may properly relate any acts or statements made by Crevani since they are admissible under Rule 63(7) as an admission of a party. Under this Rule "[a] statement made by a person who is a party to an action is admissible against him in that action." As the Comment to the Rule makes clear, the exception extends to

"*any* statement made by a . . . party . . . if the statement is offered against him. . . ." (emphasis supplied). Accordingly, Crevani's admissions, as related by Orlandini, are admissible against Crevani in their entirety.

(2) *Statements of Orlandini.*

Orlandini's statements in this context are admissible as an admission of a party under Rule 63(7) as well. Although Orlandini is a co-defendant in this action, the state of the pleadings is not dispositive as to whether the adversity requirement of the Rule is satisfied. *See, Sas v. Strelecki,* 110 N.J. Super. 14, 19 (App. Div. 1970). Since there exist a number of potential actions available to these defendants against Orlandini, the test of adversity is met and the statements are admissible.

As set forth above, when this Court reversed the decision of the Trial Court, it apparently relied on its perception of the scope of immunity, if any, from civil and criminal prosecution granted Orlandini in the Witness Protection Program. This perception could only have been based on what the Court thought it knew about the program. It most certainly was not based on the record as there was no evidence whatsoever before the Trial Court as to the terms and conditions of Orlindini's agreement with the government.

Inasmuch as it was Aniero that sought the *in limine* ruling from the Trial Court as to the admissibility of Carrochi's testimony, it was Aniero's burden to show that the *Evid. R.* 63(10) exception to the hearsay rule did not apply. Aniero failed to produce any such evidence.

Evid. R. 63(10) is completely dispositive of the issue of the Carrochi testimony as to what Orlandini told her:

> A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution.

The statements made by Orlandini were, at the time they were made, so far contrary to his pecuniary or proprietary interest, so far subjected him to civil or criminal liability, and so far created a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statements unless he believed them to be true. This is the standard of admissibility that the Trial Court applied in the absence of any evidence to the contrary. Its decision should not have been disturbed. *Cf. State v. Gaines,* 147 N.J. Super. 84, 98 (App. Div. 1975), *aff'd o.b. sub nom., State v. Powers,* 72 N.J. 346 (1977).

That the testimony of Carrochi would be highly probative cannot be gainsaid. The jury should have been given the opportunity to decide for itself what weight to give Orlandini's statements. As the court held in *State v. Rechtschaffer,* 70 N.J. 395, 413 (1976):

> Declarations subsequent to the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence or tend to establish intent are relevant and admissible. *State v. Allen,* 53 N.J. 250 (1969).

The courts have long recognized the high probative value of declarations against interest. In *State v. Jackson*, 182 N.J. Super. 98, 101 (App. Div. 1981), the court, in ruling on an exclusion of a declaration against interest under *Evid. R.* 4, in language especially applicable here, held that:

> [T]he proffered declaration against interest is of obvious high probative value, tending as it does to establish defendant's opportunity to commit the crime. Second, the record does not support the finding that "the probative value of [the] statement is outweighed by the prejudice resulting to the defendant." As the Supreme Court observed in *Stoelting v. Hauck*, 32 N.J. 87 (1960):
>
> > . . . *The search for truth is ordinarily best served by the fullest disclosure of relevant facts and circumstances. In re Richardson*, 31 N.J. 391 (1960), *and any evidence which would aid the jury in that search, unless some specific rule forbids it, should ordinarily be admitted.* [at 103] (emphasis supplied)

This Court should reconsider and reverse its decision overruling the evidentiary ruling of the Trial Court under the circumstances existing here, and, in so doing, reverse or, in the alternative, remand for a new trial.

PRELIMINARY COMMENTS TO THE RULES

*Prepared by Hon. Vincent P. Biunno, U.S.D.J. of Newark, New Jersey.**

HOW THE RULES CAME INTO EXISTENCE

The Evidence Act, 1960 (L. 1960, c. 52) adopted as law Rules 1(1) through 1(13)—Definitions; Rule 2—Scope of the Rules; and Rules 23 through 40—Privileges.

The same law set up machinery for the adoption of other rules by the joint participation of all three branches of government. Briefly, this contemplates an initiating function in the Supreme Court, which may propose rules after discussion at a Judicial Conference, and by a filing with both Houses and with the Governor. Rules so proposed take effect on July 1 of the next year unless the Legislature disagrees, this to be expressed by joint resolution approved by the Governor. See N.J.S. 2A:84A-33 to 44.

This mechanism, involving as it does the participation of all branches of State Government, renders moot any question of promulgating authority. It is borrowed from the arrangement under which the federal court rules have

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* Judge Biunno served as chief counsel to the Bigelow Commission (1956) which prepared the text that became the foundation for The Evidence Act, 1960. As counsel to Governor Robert B. Meyner, he participated in the discussion between the Weintraub Court, the Legislature and the Governor that achieved the first enactment. He was a member of the Supreme Court Committee whose 1963 Report presented suggested text for rules to the Court, and attended the conferences with the Court that submitted the first official draft in 1964. Thereafter, he served as consultant to the several Legislative committees and finally to the Guarini Commission that achieved accommodations with the Court in 1967.

been promulgated, 28 U.S.C.A. sec. 2072 and 2076, as well as 18 U.S.C.A. Sec. 3771.

Rules were proposed by the Supreme Court in September, 1964. Their effective date was several times postponed. In 1967, by JR-5, changes in the language of some rules and deletion of others were set forth, with all the rules not already law to take effect September 11, 1967. In accordance with the joint resolution, a Supreme Court order was entered promulgating these rules as so modified.